Supreme Court, U.S.
FILED
98 250 JUL 23 1998
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1997

THEODORE C. GRANGER,

Petitioner,

vs.

THE OFFICE OF ATTORNEY ETHICS OF THE STATE OF NEW JERSEY, THE DISCIPLINARY REVIEW BOARD OF THE STATE OF NEW JERSEY, BLOSSOM A. PERETZ, DIRECTOR OF THE DIVISION OF RATEPAYER ADVOCATE OF THE STATE OF NEW JERSEY,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

PETITION FOR WRIT OF CERTIORARI

THEODORE C. GRANGER, *Pro Se*
161 West 16th Street, Apt. 7K
New York, New York 10011
(212) 675-8731

147447

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

QUESTIONS PRESENTED

1. May a state impose a restriction on commenting about matters of a grievance proceeding which are pertinent to the public official's public office when the official was a participant in the proceeding or a respondent of the grievance?

2. May the state impose a restriction on commenting about matters of a grievance proceeding which relate to the fairness impartiality and efficacy of the proceeding when the comments are meant as comment and criticism of government and its officials?

3. When the grievant is an attorney and he complains that the lawyer who is his supervisor is violating the supervisor's duty, under the ethics code, to make reasonable efforts to insure that the grievant can abide by the ethics code and the attorney disciplinary system officially finds grievant to be a "disgruntled employee", which finding is a basis for denying the grievant the benefit of the remedies of the disciplinary system, is it a denial of due process not to give the grievant a hearing with opportunity to be heard in a meaningful time and manner?

4. Is it a denial of due process for the agencies of an attorney disciplinary system purposefully not to follow the rules of the system or not to follow them in good faith when the agencies purport to be fair and impartial in their publications?

5. Does Due Process require a hearing with an opportunity to be heard in a meaningful time and manner for a grievant, who is an attorney subordinate to the respondent attorney when the record of the proceeding may be obtained through civil and criminal processes and motions for good cause and the decision holds grievant to be a "disgruntled employee?"

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	1
Statement Of Jurisdiction	1
Constitutional Provisions Involved	1
Statement Of The Case	1
A. The Ethical Improprieties.	1
B. The Grievance Proceeding.	4
Reasons For Granting The Writ	6
I. The Petition Should Be Granted Because The Decision Imposes An Unreasonable Confidentiality Restriction On Comment On A Public Official And On Comment On The Functioning Of Government.	6
II. The Petition Should Be Granted Because The Decision To Dismiss Conflicts With The Rulings Of This Court On Due Process Afforded When Liberty Or Property Interests In Employment Are Affected By The State.	10
III. The Petition Should Be Granted Because The Decision To Dismiss Conflicts With This Court's Rulings On Due Process In Proceedings Affecting Petitioner's Liberty Interest In His Good Name, Reputation And Integrity.	13

Contents

Page

IV. The Petition Should Be Granted Because The Decision To Dismiss Conflicts With Rulings Of This Court On Due Process In Denying Petitioner The Minimum Due Process Defined By The Rules Of Professional Conduct As Adopted By The Attorney Disciplinary System. 16

Conclusion 26

TABLE OF CITATIONS

Cases Cited:

Armstrong v. Manzo, 380 U.S. 545, 85 S. Ct. 1187 (1965) 21, 23

Brown v. Smith, 356 U.S. 148, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958) 8

Craig v. Harney, 356 U.S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546 (1946) 8

Cunningham v. Department of Civil Service, 69 N.J. 13, 350 A.2d 58 (1975) 12, 13

Fifth Street Pier Corp. v. City of Hoboken, 22 N.J. 326, 126 A.2d 6 (1956) 23

Goss v. Lopez, 95 S. Ct. 429, 419 U.S. 565, 42 L. Ed. 2d 725 (1975) 13

Contents

Page

Grodjesk v. Jersey City Medical Center, 135 N.J. Super. 393, 343 A.2d 489 (1975) 13

Higgins v. Advsry Comm., 73 N.J. 123, 373 A.2d 372 (1977) 8

In re Farber, 95 N.J. 597 (1984) 25

In re Himmel, 127 Ill. Dec. 708, 533 N.E. 2d 790, 125 Ill. 2d 531 (1966) 10

Konigsberg v. State Bar of Calif., 353 U.S. 232, 77 S. Ct. 722 (1957), *reh. den.*, 354 S. Ct. 929, 77 S. Ct. 1374, 1 L. Ed. 2d 1441 14

Little v. Streeter, 452 U.S. 1, 401 S. Ct. 2202, 68 L. Ed. 2d 627 (1981) 15

Mazza v. Cavicchia, 105 A.2d 545 (N. J. 1954) 23

Monks v. Parole Board, 58 N.J. 238, 277 A.2d 2193 (1971) 23

Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) 12, 13

Perillo v. Advisory Comm. on Professional Ethics, 103 N.J. 366, 416 A.2d 801 (1980) 3, 12, 21, 25

Contents

Page

Statutes Cited:

N.J.S.A. 34:19-3(c) 15

28 U.S.C. § 1257(a) 1

United States Constitution Cited:

First Amendment 1

Fourteenth Amendment 1

Article 1, § 1 1

Article 1, § 6 1

Rules Cited:

RPC 1.7(b)(2) 6

RPC 1.10(e) 6

RPC 1:20-3(g)(6) 15

RPC 1:20-7(i) 15

RPC 5.1(b) 4

RPC 5.2 4

Contents

Page

R. 1:20-2(b) 18

R. 1:20-3 19

R. 1:20-7(j)(1) 22

R. 1:20-9(e)(2) 12

R. 1:20-15(e)(3) 22

R. 1:20-15(h) 24

Other Authorities Cited:

Connecticut Light and Power Company (Dkt. No. EL 93-55-000) 70 FERC ¶61,012 (1995) 2

Dzienkowski, Professional Responsibility Standards, Rules and Statute, 787 (1996-97 Edition) 8, 22, 23

Contents

Page

APPENDIX

Appendix A — Letter Of The Office Of Attorney Ethics Dated August 8, 1996 ..... 1a

Appendix B — Letter Of The Disciplinary Review Board Dated November 22, 1996 ..... 10a

Appendix C — Order Of The Supreme Court Of New Jersey Filed April 24, 1998 ..... 12a

Appendix D — Opinion 467 Published January 1, 1981 ..... 13a

Appendix E — Information About Grievance Procedures And Discipline Of Lawyers 16a

Appendix F — New Jersey Court Rules (1996) 30a

Appendix G — New Jersey Rules Of Professional Conduct 40a

Appendix H — Constitutional Provisions Involved ... 42a

Appendix I — Remittance Advice Dated May 20, 1994 (Check Nos. 0a0000479116 & 0a0000479117) ... 45a

Petitioner, Theodore C. Granger, respectfully requests that a writ of certiorari be issued to review the decision of the Director of the Office of Attorney Ethics of the State of New Jersey to dismiss the grievance.

OPINIONS BELOW

The opinions below consist of the decision to dismiss the grievance of the Director of the Office of Attorney Ethics (App. 1a), the letter of the Disciplinary Review Board affirming that decision (App. 10a), and the Order Denying the Motion for Leave to Appeal (App. 12a).

STATEMENT OF JURISDICTION

The Order Denying The Motion for Leave to Appeal of the Supreme Court of the State of New Jersey was entered on April 24, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First and Fourteenth Amendments of the United States Constitution (App. 42a) and Article 1, § 1 (42a) and Article 1, § 6 (App. 43a) of the Constitution of the State of New Jersey are found in the appendix.

STATEMENT OF THE CASE

A. The Ethical Improprieties.

Blosom Peretz is currently Director of the Division of the Ratepayer Advocate ("DRA"), an agency which basically put

represents ratepayers in proceedings before the New Jersey utilities commission, whose name is the Board of Public Utilities ("Board"). Both agencies have undergone name changes in the past ten years, but that is not important here. At the time of these events, petitioner was an attorney in the DRA, which consisted of about 15 attorneys. Peretz, while in private practice negotiated a contract for the purchase and sale of electricity between Freehold Cogeneration Associates ("Freehold") and Jersey Central Poser and Light Company ("JCP&L").

The Board ordered the parties to the contract to renegotiate it, and, lacking a mutual agreement, the Board would instead determine a reasonable price, after hearings. The parties could not agree on a renegotiation. JCP&L, joined by the DRA, requested that the Board hold hearings. Two central questions dominate everything, including what transpired at the grievance proceedings. The first is whether the state (through the Board) could revisit the contract once it approves it. The second, and this is the one that most interested the DRA, is whether the state or the federal government could ever set the price higher than the Congressional Ceiling ("CC"), the so-called price of alternative electricity available to the utility. (The DRA's position was ultimately vindicated when the Federal Energy Regulatory Commission adopted a variant: that all contracts in excess of the CC are null and void. Connecticut Light and Power Company (Dkt. No. EL 93-55-000) 70 FERC ¶61,012 (1995)). Whatever the answer to the first question, the DRA believed that the ratepayers should never have to pay a price greater than the CC. Petitioner was the attorney who was in charge of the Freehold Litigation for the DRA (he also did the work in the Freehold Litigation except for a period in which he took a sick leave of half a year).

The Freehold Litigation involved both of these questions. The litigation forked into two branches: (1) on the state level:

that initiated by the Board; and (2) on the federal level that was initiated by JCP&L and joined by the DRA. When the parties failed to reach an agreement (primarily because Freehold did not want the contract price to be decreased), the contract went to hearings before the Board. At the threshold of the beginning of hearings, Peretz took the position of secretary of the Board. Eventually the first of the two questions was determined in the Board part of the Freehold Litigation by the Third Circuit to be "no." The second question was never reached in the Freehhold Litigation because of Peretz's unethical interference with the petitioner's representation of the ratepayers in that case. The plan, developed before Peretz's intervention was to take an appeal of the FERC decision in order to have the court determine the validity of the DRA's position. Peretz and the various elements of the attorney disciplinary system ("ADS") acknowledge that she had a conflict of interest. Evidence exists that Peretz from her position of secretary of the Board had gotten involved with the Freehold hearings being held at the Board. Evidence exists, that, using the power of her position, she was interfering with the makeup of the part of the DRA responsible for the Freehold Litigation.

When the Freehold Litigation had ended at the Board, Peretz moved to the Directorship of the DRA. This move is a *per se* violation under the Rules of Professional Ethics ("RPC"). Advisory Opinion 467 (App. 13a). It was improper for Peretz to become a member of the organization participating in the Freehold Litigation.

Moreover, several of Peretz's submissions, admitted that she required Burcat, the attorney who "mediated" between petitioner and Peretz, to discuss the activities of the Freehold Litigation with her. This is another *per se* violation of the RPC. *E.g., Perillo v. Advisory Comm. on Professional Ethics*, 103 N.J. 366, 379, 416 A.2d 801 (1980). There is evidence that her

ethics officer Leora Mosston was a willing participant in circumventing her secretary who was a screener in connection with the litigation. Peretz explicitly tried to dissuade petitioner from proceeding with the Freehold Litigation. Despite the supposed intermediation role ("screen") of Burcat, evidence exists showing that Peretz was gradually getting petitioner — involuntarily — to report to her. She made work at the division intolerable with tirades, false accusations about professional performance, false accusations about meeting deadlines, and excessive micromanagement requiring repeated rewriting of simple memoranda, requiring daily time reports showing detail of what was worked on (no one else was required to do so), etc. Finally, Burcat found a position elsewhere and left the DRA. At this point, Peretz's submissions admit that she did not appoint a replacement screen for Burcat. She refused his entreaties for time to work on the Freehold Litigation, but, instead, piled on more trivial time-consuming responsibilities. Her gratuitous comment was that Petitioner was engaged in "overkill." She forbade him from working on Freehold-related matters: "working on Freehold in your office is 'unacceptable' ". This is a direct, *per se* violation of RPC 5.2 which requires the supervisor to make reasonable efforts to allow a subordinate to conform to the RPC 5.1(b).

Finally, petitioner, who had been studying the ethics law from before Peretz's directorship, decided to file a grievance with the Office of Attorney Ethics ("OAE"). At that point he could not take the stress of Peretz's outrageous behavior toward him and the moral dilemma it presented.

B. The Grievance Proceeding.

The grievance accused Peretz of the improprieties enumerated above. The OAE attempted to dissuade petitioner from proceeding with the grievance and expressed the opinion

that it was improper "to tell on your boss." After more than half a year and without any investigation of the accusations from the side of the petitioner, the OAE dismissed the grievance. In the report written only with the grievance and some affidavits supplied by Peretz, the writer who was under the supervision of the Director's Counsel concluded that petitioner was a "disgruntled employee" consistent with the expression of his belief in the impropriety of reporting on your boss. The writer had never spoken to the petitioner and petitioner was not given the opportunity "at a meaningful time and in a meaningful manner" to respond. Further, the writer did not consider the petitioner's comments pointing out that Peretz's submissions were an admission that she had had improper contact with the Freehold Litigation through Burcat and that she had forced petitioner to report to her directly when Burcat left the DRA.

Petitioner took an appeal to the Disciplinary Review Board ("DRB"), complaining about the manner in which the OAE had processed his grievance and submitted documentary evidence thoroughly contradicting each of the findings of the report upon which the OAE relied. The DRB, which is under duty of the Court Rules to review such challenges completely ignored that part of the appeal and the new evidence. The result is that there was no investigation to obtain available evidence in support of petitioner's accusations and the record completely ignored his documentary evidence, including affidavits in support of the charges. There is no hint of evidence of improper conduct, except for the recapitulation of the charges made by the petitioner. The OAE and the DRB functioned as a kangaroo court.

The Court Rules do not allow a dismissed grievant to take an appeal to the N.J. Supreme Court. Petitioner filed a request with the Court for Leave to Appeal on December, 1996. On April 23, 1998, the Supreme Court denied the request.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION IMPOSES AN UNREASONABLE CONFIDENTIALITY RESTRICTION ON COMMENT ON A PUBLIC OFFICIAL AND ON COMMENT ON THE FUNCTIONING OF GOVERNMENT.

The question determined by the decisions below was whether Peretz sequestered herself by use of screens which Peretz purported prevented her from participating in or making contact with the litigation giving rise to the conflict of interest. The answer should have been that, as a matter of law, it was impossible to do so.

The final order of the attorney disciplinary system ordered petitioner "to continue to keep all communications regarding this ethics matter confidential." Peretz is a public official and, as such, she should be held accountable for the behavior covered by the grievance. The RPC does not recognize government consent to what is otherwise a conflict of interest under the RPC 1.7(b)(2) and RPC 1.10(e). (App. 40a).

In this particular case, the attorney disciplinary system stonewalled the petitioner and foreclosed the development of available relevant evidence supportive of the accusations contained in the grievance with the end effect of protecting Peretz. From the outset, when the Counsel of the Director, representing the Director, expressed his judgment before any investigatory contact with petitioner, the disciplinary system never made a single serious contact concerning the identification, location, completeness or sufficiency of the evidence. From a review of the history and record of this proceeding it is clear to any one

knowledgeable with administrative proceedings that the procedure followed specifically in this proceeding was inadequate, incomplete, and superficial with the purpose of forestalling the development of any evidence in support of petitioner's grievance. It ignored any evidence disfavorable and incriminating against her and protected her from the development of any such evidence: At the OAE level, the disciplinary system ignored the petitioner's reply to Peretz's submission, which showed that Peretz's responding submission supported the accusations of the original grievance. In addition, the petitioner's reply submitted evidence that Peretz's responding submission had misrepresented the petitioner's personnel records, among other things. Especially prominent, the OAE failed to apply precedent which was dispositive on the facts of the situation in favor of the petitioner's grievance.

At the DRB level, the DRB ignored petitioner's repeated requests to make an appearance for oral argument and yet again a separate request for a hearing based on what had to be purposeful misrepresentations. Furthermore, the DRB completely ignored evidence that no investigation had taken place and petitioners' evidence that demonstrated that Peretz circumvented what she had called "screens," both at the Board and the DRA, and that she interfered with the Freehold Litigation. At the Supreme Court level, there is an appearance of impropriety because the order denying the petition for leave to appeal could have been affected by the apparent partiality of the Chief Justice.

The primary purpose for the confidentiality requirement is to protect the respondent Peretz from public comment and criticism.

> The confidentiality that attaches prior to a finding of probable cause . . . is primarily for the benefit of

> the respondent, and protects against publicity predicated upon unfounded accusations.

Dzienkowski, Professional Responsibility Standards, Rules and Statute, 787 (1996-97 Edition). That may be a warranted goal of the attorney disciplinary system for attorneys in private practice, but it is surely not justified when the accusations, which are supported by ample documentation, relate to the conduct of a government attorney, inextricably part of conduct as a public official. The Constitution unquestionably guarantees the right to citizens to criticize public officials, including judges. *Brown v. Smith*, 356 U.S. 148, 153, 78 S. Ct. 622, 625, 2 L. Ed. 2d 589, 596 (1958); *Craig v. Harney*, 356 U.S. 367, 376, 67 S. Ct. 1249, 1255, 91 L. Ed. 1546, 1552 (1946).

Thus, the confidentiality requirement is invalid because of the improper limitation of the petitioner's freedom of speech, protected by the Constitution of the United States and New Jersey, to comment upon and criticize the conduct of public officials (*e.g.*, Peretz, Mosston and Chief Justice Poritz) and the manner of processing of this grievance by the Judiciary. The fact that the decision and report improperly contain the "disgruntled employee" conclusion without having given a timely and meaningful opportunity for petitioner to obtain and present the appropriate evidence chills the exercise of the rights of speech in this case.

According to New Jersey law, the government attorney is held to a higher standard insofar as there need not be actual wrong doing, but merely a likelihood of wrongdoing, an appearance of improper conduct when viewed through the eyes of the reasonable citizen who has knowledge of the facts of the situation. *Higgins v. Advsry Comm.*, 73 N.J. 123, 373 A.2d 372 (1977).

The underlying accusations in the grievance center on Peretz's exercise and use of the powers and perquisites of her office in pursuit of an unlawful and unethical purpose (*viz.*, the termination of the opposition of the DRA, and its predecessor the DRC, to ratepayer subsidy of cogeneration (in particular, of the Freehold project in the Freehold Litigation) — a position which is not only consistent with Congressional intent and PURPA, but simply a reformulation of the explicit statutory language of PURPA. Peretz's behavior and strategy in this proceeding have bearing on her qualification as a public official.

But suppose such a restriction were valid. If there can be any such thing as a *quid pro quo* between the public and the attorney discipline system, it is that the disciplinary system will with reasonable diligence obtain and properly analyze the available relevant evidence relating to the grievance and will follow its own preannounced procedure in a bona fide fashion in exchange for the silence of the grievant, for the purpose of protecting the respondent. That may be legally appropriate where the respondent is not a public lawyer or the administrators of the attorney disciplinary system (which the most recent rules tend to put on an "automatic pilot" lessening the role of the Supreme Court of New Jersey) do not abuse their powers since the rules guarantee them immunity from suit. The Supreme Court of New Jersey has specified what in its view constitutes an appropriate and proper processing of grievances. Any restriction on speech when the agency does not live up to its end of the bargain by following its rules in good faith should be invalid because of failure of the "bargain." The rules protect the officials of the attorney disciplinary system from liability and suit. They are not elected nor responsible to those elected. The only way to evaluate the disciplinary system is to open it up to public debate; public exposure will be productive especially when those having direct knowledge and experience can participate.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION TO DISMISS CONFLICTS WITH THE RULINGS OF THIS COURT ON DUE PROCESS AFFORDED WHEN LIBERTY OR PROPERTY INTERESTS IN EMPLOYMENT ARE AFFECTED BY THE STATE.

The judiciary of the state of New Jersey has undertaken to regulate the superior/subordinate employment relation of attorneys by devoting parts of the RPC to it. The attorney understands that these duties will be enforced on his behalf and against him and against other attorneys.

The framework of the RPC's regulation of the superior/subordinate relationship of lawyers is similar to that of zoning plan in constraining behavior by imposition of duties of participating elements in an interdependent way. The superior must through reasonable efforts provide a suitable environment in which the subordinate can carry out his duties under the RPC. And if the superior fails to do this, the subordinate is required to report the conduct to the authorities. *In re Himmel*, 127 Ill. Dec. 708, 533 N.E. 2d 790, 125 Ill. 2d 531 (1966). This set of mutually dependent duties exist but/for the legal relationship created and imposed upon the members of the bar by the Supreme Court.

The petitioner, as the subordinate in this case, has a liberty interest at stake because the state required him as a precondition to continued employment to become a member of the New Jersey bar and the attorney disciplinary system required petitioner to conform his conduct to the aforementioned duties imposed by the Supreme Court. But for the web of legal mutually

dependent duties so imposed, the situation presented by the grievance would not have occurred. The attorney disciplinary system should be required to hold hearings at least when there are conflicting versions of the truth, and, especially when the framework, as here, can provide the wherewithal.

The most immediate effect of that finding was foreclosing the petitioner from obtaining a hearing and the imposition of a suitable disciplinary action against Peretz for conduct which was improper on its face, according to *Advisory Opinion 467*, supra. *See* Ethical Improprieties in the Statement of the Case, above. Peretz created the original situation through abuse of public office (both the Secretaryship of the Board and the Directorship of the DRA). According to the RPC she bears full individual responsibility. Her conduct was, as a matter of law, improper because it qualified under all of the three criteria of Advisory Opinion 467: (1) A location ("Do the offices of the grievant and the Peretz have the same location and address?" — Yes); (2) A organizational structure ("Are grievant and Peretz in the same division?" — Yes); and (3) A reporting hierarchy ("Do grievant and Peretz report to the same Director?" — Yes).

If that is not enough, the admission that Peretz had Burcat, "the screen," report to her on the Freehold Litigation is another *per se* violation. And, if these are not enough, the admission that no screen replaced Burcat when he left the DRA to force petitioner to deal with Peretz alone is another *per se* violation (based on the legally erroneous assumption that under the circumstances Peretz could legally shield herself at all by establishing a screen). By her own submissions in response to the grievance, Peretz has established that she failed the absolute prohibition against any contact whatsoever with both the Freehold Litigation. "[T]he avoidance of even the appearance of professional impropriety encompasses "the absolute need"

to refrain "from any contact, direct or indirect," from the Freehold Litigation *Advisory Opinion 467* (January 1, 1981) (App. 13a). *See also Perillo v. Advisory Comm. on Professional Ethics*, 103 N.J. 366, 379 416 A.2d 801 (1980).

Furthermore, employers (past or prospective), or anyone else who wishes, because these character traits are pervasive to human relations and activities (including law enforcement agencies), may obtain the documents of the proceeding upon a showing of good cause via civil or criminal subpoena or by motion seeking information addressed to the DRB, the agency which ratified the OAE's decision and "report." R. 1:20-9(e)(2). The rule does not give the petitioner an opportunity to protect himself in any way. (He is not given notice of such a pending request. Only the OAE Director and Peretz are given a right to notice and an opportunity to be heard.) What effort can be expected from the Director (the partial author of the decision) and Peretz (the original respondent of the grievance) to protect the interest of the grievant? The Director, through his Counsel, evinced from the outset of the proceeding and through the preparation of the report and its conclusion his view, which was inconsistent with the RPC law governing lawyers in the subordinate/superior relationship. *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976); *Cunningham v. Department of Civil Service*, 69 N.J. 13, 350 A.2d 58 (1975).

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION TO DISMISS CONFLICTS WITH THIS COURT'S RULINGS ON DUE PROCESS IN PROCEEDINGS AFFECTING PETITIONER'S LIBERTY INTEREST IN HIS GOOD NAME, REPUTATION AND INTEGRITY.

The state of New Jersey recognizes a protectable interest in reputation, good name, honor and integrity. The OAE turned a proceeding based on a grievance against Peretz into a castigation of the petitioner, without giving the petitioner notice that this would become an issue in the proceeding and without giving the petitioner a meaningful opportunity to respond. *Grodjesk v. Jersey City Medical Center*, 135 N.J. Super. 393, 343 A.2d 489, 500 (1975); *Goss v. Lopez*, 95 S. Ct. 429, 419 U.S. 565, 42 L. Ed. 2d 725 (1975); *Paul v Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976); *Cunningham v. Department of Civil Service*, 69 N.J. 13, 350 A.2d 58 (1975).

Because of the regulatory jurisdiction over the employment relation between the lawyer relation of superior and subordinate, the finding of the OAE that the grievance was filed because petitioner was a disgruntled employee implies that the petitioner was dishonest, or otherwise wanting, in the practice of his chosen profession. The agency responsible for that finding was delegated that power by the New Jersey Supreme Court which under the New Jersey Constitution has direct responsibility for the ethical conduct of attorneys. It is thus not a statement merely about credibility in a normal administrative proceeding or court proceeding. It touches not only on the petitioner's professionalism, but pronounces a verdict over broader-based character and ethical traits which pervade human relations and activities.

The most immediate attendant consequence of this finding was to deny the petitioner an appropriate investigation by the designated authority empowered to undertake an investigation, when the evidence was beyond the reach of the petitioner and appropriate to the grievance against Peretz. See the last two paragraphs of the preceeding Point, II, for an amplification of this thought and an additional consequence of this finding of the OAE.

The other consequence is the chilling effect on the exercise of speech rights, *i.e.*, the discouragement of taking advantage of seeking rights of remediation in the later stages of the grievance proceeding or even of other civil or criminal proceedings. *Konigsberg v. State Bar of Calif.*, 353 U.S. 232, 273, 77 S. Ct. 722, 733 (1957), *reh. den.*, 354 S. Ct. 929, 77 S. Ct. 1374, 1 L. Ed. 2d 1441.

The date of filing of a grievance is not limited by a statute of limitation. The RPC, by its own terms, declares conduct involving dishonesty, etc., and conduct prejudicial to the administration of justice a form of professional misconduct. Thus, the door is open for anyone to file a grievance against the petitioner and to use the decision of the attorney disciplinary system as evidence in support of such a charge.

Surely when the OAE decided, and the DRB ratified, the (gratuitous and improperly grounded) finding that petitioner was a "disgruntled employee," without prior notice to petitioner without a reasonable opportunity to be heard, the attorney disciplinary system was treating the issue as a counter accusation, in effect making petitioner a "respondent," with all of the implications described above, rather than treating him as a simple grievant. Those events (if not sooner) in the process triggered petitioner's right to have his requests for investigation and a hearing granted and implemented.

Furthermore, when the state is affecting a person's liberty or property rights and has the means available, and the person is not in a position to do so or does not have the resources to avail himself of those means, the disciplinary system is required to accommodate his need. *Little v. Streeter*, 452 U.S. 1, 401 S. Ct. 2202, 68 L. Ed. 2d 627 (1981). Thus the attorney disciplinary system is required to use its discovery powers (*e.g.*, RPC 1:20-3(g)(6) and RPC 1:20-7(i)) which are already in place to obtain the information needed to support the petitioner's grievance because the outcome of the proceeding depends upon that information.

It is a classical case of deprivation of due process for government to impose on a particular individual that which is in contradiction of the principles adopted by its judiciary and the legislative branches of government. It is unconstitutional — it is arbitrary and an abuse of discretion — for the enforcer agencies (whose employees and officers the rule purports to protect from liability and suits), to use powers purposefully at odds with the requirements and policy of the regulations of the Judiciary and the statutes of the Legislature.

The authorities of the attorney disciplinary system used the system to effectuate their biased and unlawful views in contradiction of the "Whistle Blowing Statute," (N.J.S.A. 34:19-3(c) ("The Conscientious Employee Protection Act"). (App. 43a)), which represents legislative policy, reinforced on the judiciary's side by the RPC. The aims of the Whistle Blowing Statute and the RPC are consistent with each other and bolster each other. The OAE insinuated its indisputably illegal view in the processing of the grievance and thereby tainted it. Thus, the enforcement agencies have trenched on petitioner's rights of reputation, good name, honor and integrity in the work place, and to the machinery of the attorney disciplinary system.

IV.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION TO DISMISS CONFLICTS WITH RULINGS OF THIS COURT ON DUE PROCESS IN DENYING PETITIONER THE MINIMUM DUE PROCESS DEFINED BY THE RULES OF PROFESSIONAL CONDUCT AS ADOPTED BY THE ATTORNEY DISCIPLINARY SYSTEM.

According to the publication of the attorney disciplinary system, "Information about Grievance Procedures and Discipline of Lawyers," (App. 26a) published by the attorney disciplinary system, a grievant may expect

> a fair and impartial investigation. This means listening to [the grievant's] story, but also the [respondent] lawyer's side as well. It also means that whatever independent investigation may be necessary to establish the facts will be conducted.

The grievant may also "expect to be called . . . to provide additional information for the investigation . . . and . . . to be kept informed of the progress of the investigation . . ." The discussion begins with these representations to the public and then moves on to the provisions of the Court Rules.

• *Impartiality and fairness of investigation.* During the only time that petitioner was able to contact the Counsel for the Director, Engelhardt, by phone, who expressed the view that the petitioner was improperly complaining about his boss — a position, which diametrically opposes the duties and requirements set forth by the RPC and the statutory law. Engelhardt shaped the contents of the report of the "investigator." The bias was expressed before any serious

involvement of the OAE. Indeed, the expression occurred after the initial reaction of the OAE that the attorney disciplinary system would not take jurisdiction of the grievance! That prejudgment and bias clearly found its way into the report relied upon in the decision to dismiss the grievance.

• *Interaction with grievant.* Petitioner may "expect to be called . . . to provide additional information for the investigation . . . and . . . to be kept informed of the progress of the investigation . . ." (App. 26a). In fact, no one at the OAE asked for additional information to carry on the investigation (even though the petitioner had invited inquiry). Indeed, no one at the OAE even informed him that there was an investigation! On several occasions beginning with his letter in April 1996, in which petitioner specifically correlated the sections of the RPC with the grievance (which the RPC does not require), the petitioner attempted to open up communications with the OAE by letters offering his cooperation and stating his willingness to identify evidence which would support his allegation, and further inquired how the investigation was to proceed. Those letters remained unanswered.

• *Fair and Impartial Investigation.*

> A fair and impartial investigation] means listening to [the grievant's] story. . . . It also means that whatever independent investigation may be necessary to establish the facts will be conducted.

(App. 26a). On appeal to the DRB and in the petition for leave to appeal to the Supreme Court of New Jersey, petitioner accused the OAE of improperly processing the grievance. Under the rules, petitioner, had submitted evidence in support of his accusations. Since the OAE did not have the evidence, the evidence provided by petitioner with the appeal document

demonstrated that, in fact, the OAE did not "listen to the grievant's story" and did not investigate it, let alone the undertaking of an independent investigation to establish the facts and uncover the available evidence which the petitioner asserted existed.

• *Abuse of Jurisdiction.* The decision of the OAE to dismiss did not identify the authority upon which the Director had determined to assert his own jurisdiction over the grievance. R. 1:20-2(b) deals with the authority of the Director of the OAE to exercise jurisdiction over the investigation and prosecution any case. The proper response would have been to assign it to a district committee if, as apparently the Director believed, the grievance did not present serious or complex issues that must be immediately addressed or that the grievance required emergent action, the only grounds for the Director to assert jurisdiction at that point. (Subparagraph (A) of R. 1:20-2(b)). Alternatively, neither the Supreme Court nor the Board had directed the Director to assert jurisdiction. (Subparagraph (E) of R. 1:20-2(b)). These are the only relevant jurisdictional grounds recognized by the rules for the Director of the OAE to exercise jurisdiction of any case. Since the Director (unlawfully) denied jurisdiction to the entire attorney disciplinary system in his November 1, 1995 letter answering petitioner's grievance, the Director must not have believed the grievance involved issues that must be immediately addressed or that required emergent action. Furthermore, the fact that the Supreme Court of New Jersey did not deny petitioner's motion for leave to appeal until April 23, 1998, would confirm that conclusion. (The Director should have assigned the grievance to the appropriate district committee so that it would receive the attention of an investigator who was a lawyer who knew how to obtain and treat evidence, as the rules require). This defect raises the issue of whether the Director acted ultra vires and whether the matter should have been assigned to a district ethics committee.

• *Unqualified and Dysfunctional Investigator.* The report was addressed, not to the Director, in accordance with the rules, but, rather, to the Counsel to the Director, Engelhardt who had early expressed his strong prejudgment and partiality on the fundamental questions of whether a subordinate should report a superior's significant violations of the RPC and whether the OAE should undertake a genuine investigation of such a situation. According to R. 1:20-3, the grievance should have been assigned to a member of the bar of the State of New Jersey for investigation and the investigatory report, not someone (Jennifer Hand) who was and still is unqualified to practice law in the State of New Jersey. In the usual grievance proceeding, a lawyer is assigned the investigation. In contrast, a non lawyer was assigned to a task which demands experience and understanding of the functioning of the courts and administrative agencies, the interrelationship between the federal and state systems, utilities and cogeneration law, and other complex matters — not to speak of handling and eliciting evidence and exercising the judgement requisite to test credibility and to decide which strands of evidence and hints of evidence to pursue.

Furthermore, the investigator was supposed to undertake a fair and impartial investigation to determine if there is a reasonable prospect of proving misconduct by clear and convincing evidence. Instead, the investigator used the more demanding "clear and convincing" standard on a "record," as though a court proceeding, consisting of the grievance and Peretz's response. The petitioner's reply was ignored, as explained above. As described earlier, the "investigator" did not investigate the petitioner's side of the case. She did not contact the petitioner to identify the evidence which he stated existed and which needed some kind of protection. The OAE did not try to compensate for the clear advantages that Peretz enjoyed by virtue of her position and control of the sources of evidence. It exerted no effort at all to track down the evidence

which supported petitioner's accusations. The process followed by the OAE was not *bona fide.*

The investigator did not once contact the grievant and gave no indication of an independent investigation necessary to establish the facts. The investigator could not have known even where to start to look to ascertain whether evidence of misconduct existed. The investigator could not have known where to look for this evidence (*e.g.*, transcripts of hearings, newspaper articles, official documents, eyewitnesses and witnesses to relevant occurrences or states of affairs, participants in hearings, personnel records, personnel formerly having a relation with the predecessor DRC and DRA). Some of the evidence in support of the grievance emerged in the part of the proceeding before the Disciplinary Review Board in petitioner's complaint about the way the OAE processed the grievance by the OAE. (All of the decisions and communications of the attorney disciplinary system ignored and therefore did not acknowledge the existence of the evidence contained in the petitioner's appeal document in support of the petitioner's accusations, and evidence which clearly contradicted the investigator's recitation of "facts" in support of a dismissal)

From the face of the "preliminary report" the "investigator" (who had never communicated with the petitioner to discuss the grievance or the available or the sufficiency of evidence in support of the accusations of the grievance) was operating in a sterilized room, outside of reality, consisting only of the petitioner's April 4, 1996 letter and Peretz's response submission supported by affidavits and under the direction of the Counsel of the Director, who had from the first day revealed his unlawful view of the matter.

The "investigator" was not acting as the typical investigator or as the investigator described in both the rules and the explanatory literature of the attorney disciplinary system, but

as an administrative law judge who inherited a "record" (with the development of which this "judge" had absolutely nothing to do). Though acting like an administrative judge, she did not apply the correct standard "a reasonable prospect of proving misconduct by clear and convincing evidence" and ignored the applicable opinions and decisions of the attorney disciplinary system, *e.g.*, *Advisory Opinion 467* (January 1, 1981) and *Perillo v. Advisory Comm. on Professional Ethics, supra.* (These precedents require a finding of impropriety as a matter of law). A major error of the "investigator" runs throughout the "report," the assumption, not based in the law, that Peretz could legally be screened from participation in the affected proceedings. This assumption is incorrect because *Advisory Opinion 467* cited an earlier opinion (*Opinion 381*) holding that a public attorney, substantially involved in a pending suit, was prevented from accepting employment with a private law firm active in the litigation even though the private firm represented that it would screen the attorney from any participation in the case.

She overstepped her authority, acting as a judge (Note: the title, "*Granger v. Peretz*," repeated use of the phrase, "the record," etc.) applying a clear and convincing evidence test, instead of the more lenient test of a reasonable prospect of establishing an impropriety, with the grievant and the respondent as parties in an action initiated by petitioner, *pro se*, against Peretz, parties who were under a duty to present evidence to the court (though without the power of discovery). This, along with the other shortfalls catalogued in this point and throughout this brief, underscores how the whole process, and especially this step, was manipulated at the OAE to arrive at what was the foregone conclusion reflecting the view expressed by the Counsel for the Director to petitioner during the only telephone conversation, on December 1, 1995, shortly after receipt by the OAE of the petitioner's October 17, 1995 grievance. *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965).

• *Failure of the DRB to consider improprieties in the processing of the grievance and failure to order the holding of a hearing.* The rule (R. 1:20-7(j)(1)) authorizes the petitioner to complain to the DRB about the improper processing of the grievance by the OAE and its staff exclusively to the DRB. The rule permits putting in evidence facts which underlie the allegations of improper processing. Since the DRB has exclusive jurisdiction under the rule, the DRB hears and determines those charges as a grievance against the OAE. But, the DRB being the body deciding a grievance, is required to hold an investigation and issue a report with reasons even if it does not uphold the complaint. Recommendation 8.3:

> Complainants should be notified in writing when the complaint has been dismissed. The notice should include a concise statement of the specific facts and reasoning upon which the decision to dismiss was made.

Dzienkowski, supra (1996-97), 743. The petitioner requested the DRB to allow oral argument, which the rules permitted him to do. R. 1:20-15(e)(3). Also, the DRB ignored the petitioner's request to appear before the DRB in oral argument. It simply held its meeting without notifying the petitioner of the hearing.

With the appeal document, the petitioner submitted evidence in order to show the DRB that there had been no investigation. All of the evidence was unknown to the "investigator." Most important, the evidence contradicted every major finding of the investigator's report. When all is said and done, the petitioner (not the OAE) had shown that there was documentary evidence supporting each of the accusations in the grievance and, if the OAE or the attorney disciplinary system ever initiated a *bona fide* investigation, the system would have been capable of uncovering even more evidence supportive of the grievance.

Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965).

Finally, given the evidence presented by petitioner to the DRB, a member of the public with knowledge of the particular circumstances of this case would have to conclude that Peretz, at a minimum, knowingly created a situation emphatically manifesting an appearance of impropriety.

• *Failure of the DRB to provide petitioner with Peretz's response to his appeal document before the DRB rendered its decision.* The petitioner requested the DRB to provide him with a copy of Peretz's response to his appeal document four times — twice before the DRB's decision, starting in October, 1996, and twice after the DRB upheld the OAE on November 22, 1996. The last request was on December 9, 1996. He finally got a copy on December 20, 1996, nearly a month after the decision. The comments on the model code recommend that "a complainant should receive contemporaneously the same notices and orders the respondent receives as well as copies of respondent's communications to the agency . . . ." *Dzienkowski, supra*, 743. The recommendation is important, if the OAE had performed its functions, and had been responsive and impartial, as the following demonstrates. Immediately upon receiving Peretz's response to the petitioner's appeal document, petitioner wrote the general counsel of the DRB complaining that the submission contained misrepresentation and he requested a hearing with discovery and the opportunity to refute the statements of Mosston and Peretz in Peretz's response to the petitioner's appeal document. The DRB rejected this request. The refusal to provide the requested copy before decision is in New Jersey a violation of due process. *Mazza v. Cavicchia*, 105 A.2d 545 (N. J. 1954); *Monks v. Parole Board*, 58 N.J. 238, 249-250, 277 A.2d 2193 (1971); *Fifth Street Pier Corp. v. City of Hoboken*, 22 N.J. 326, 126 A.2d 6 (1956). In the

response, Mosston, who refused a request of the DRB to provide petitioner a copy of Peretz's appeal response, reasserted that the petitioner was lying when he claimed that the reimbursement, through the intervention of the acting Public Advocate, of some $700 in travel expenses was evidence of petitioner's reputation of honesty and integrity. In fact, the reimbursement took place and a copy of the payment is submitted. (App. 45a-46a). This incident also demonstrates the importance of an investigation which has access to important relevant documents which the petitioner may no longer have and the importance of providing petitioner a copy of the document before it is considered by the decision maker. The incident also shows, what by now should be clear from a review of the history of the proceeding, the intent of the agency to stonewall and not investigate the petitioner's case to build a record. The rules do not give the agency that option.

• *Failure of the New Jersey Supreme Court to Provide an Impartial Review of the Petition for Leave to Appeal.* After the DRB failed to order the OAE to correct the improper processing of the grievance, on December 12, 1995, the petitioner sought leave to raise the constitutional issues raised by the OAE's, decision and the DRB's ratification of it, before the New Jersey Supreme Court. The rules prohibit the DRB from considering and resolving constitutional issues. R. 1:20-15(h). On April 23, 1996, the Supreme Court denied petitioner leave to appeal. The review of the petition for leave to appeal was tainted by the fact that the Chief Justice had participated in it — the discussion and the voting — though she had been Attorney General during the Freehold Litigation and had been personally involved in it.

The Chief Justice had been Attorney General of the state during the Freehold litigation and had participated in the Freehold Litigation. In particular, she participated in the crucial discussions

leading up to the decision that the Board would no longer actively participate in these proceedings. From that point on, the Attorney General's office merely remained a passive observer.

In addition, the Chief Justice was (and may still be) an acquaintance of Peretz and had worked with Peretz during the period that the Chief Justice was in the Attorney General's office. In New Jersey, a personal interest is a basis of a conflict of interest and has been held to include personal relationships such as friendships. *In re Farber,* 95 N.J. 597 (1984).

The New Jersey Supreme Court has held that when government attorneys and officials have had to work together, to take subsequent official part in opposition to each other in adversarial proceedings is a conflict of interest.

> As important as the actuality or likelihood of conflicting interests and divided loyalty is the public perception of such a professional schism in that kind of situation. [T]he public would have the tendency to believe that the municipal prosecutor would be less than zealous in his prosecution of a municipal police officer. [Citations omitted].

Perillo v. Advsry Cmm on Profsnl Ethics, 83 N.J. 366, 375 (1980).

Furthermore, the Chief Justice, while in private practice, had also represented State Farm Insurance in litigation which was the object of the billing dispute (and litigation) between State Farm and the DRA. State Farm challenged virtually all bills that the DRA, no matter which DRA lawyer was involved. The State Farm litigation was the subject of the affidavit of Mosston, submitted by Peretz in this proceeding, in which

Mosston alleged that State Farm was contesting petitioner's billing because of some kind of dishonesty on petitioner's part. (The DRA, at that time, assessed an hourly charge for the time of staff working on the rate proceeding). A published opinion of the New Jersey Supreme Court which describes the situation refutes Mosston's allegation, which was part of the counter strategy of Peretz, headed by Mosston, to discredit petitioner's integrity in the eyes of the OAE and DRB and the attorney disciplinary system. (Quaere: Was it ethical for the so-called "ethics" officer to be in charge of defending Peretz and to advocate on one side of an ethics proceeding, as opposed to the other, when both grievant and respondent were both employees of the Division at the time of the complained of improprieties?)

When the Chief Justice, a lawyer, would be tainted by a conflict of interest in the RPC, that taint is not washed clean, but, as part of her being, goes with her to the Supreme Court. The Supreme Court could, therefore, not act as an impartial decider because the Chief Justice, tainted with a conflict of interest, did not qualify as an impartial judge. Mosston's having raised the issue of petitioner's integrity in the grievance proceeding reinforced the other grounds for granting petitioner the hearing he requested.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

THEODORE C. GRANGER, *Pro Se*
161 West 16th Street, Apt. 7K
New York, New York 10011
(212) 675-8731

APPENDIX A — LETTER OF THE OFFICE OF ATTORNEY ETHICS DATED AUGUST 8, 1996

OFFICE OF ATTORNEY ETHICS
OF THE
SUPREME COURT OF NEW JERSEY

CN 963
TRENTON, NEW JERSEY 08625
609-292-8750

DAVID E. JOHNSON, JR.
Director

OFFICE OF DIRECTOR

August 8, 1996

Theodore C. Granger, Esq.
161 West 16th Street
Apt. 7-K
New York, New York 10011-6204

Re: **Granger v. Peretz**
Docket No. XIV-96-242E

Dear Mr. Granger:

The individual assigned to investigate this matter has submitted a written report to me. A copy of this report is enclosed.

In all ethics cases the Office of Attorney Ethics must be able to prove any charges to the standard of clear and convincing evidence. After reviewing the investigation report I have determined that there is not clear and convincing evidence of unethical conduct on the part of the respondent that would warrant a formal hearing. As a result I have dismissed this matter and closed our file.

Appendix A

If you feel that the disposition of the matter is in error, you may appeal this decision to the Supreme Court's Disciplinary Review Board within twenty-one (21) days of the receipt of this letter. Requests for appeal forms must be in writing specifying the name of the attorney complained against, the docket number, as well as your name and address. Do not go into the facts of the case or the reasons for your appeal in the letter requesting the appeal forms. All arguments to support an appeal must be made on the appeal form itself. Telephone requests for such forms cannot be honored. The twenty-one (21) day appeal period will be satisfied if your letter requesting appeal forms is received within that period and if the appeal forms themselves are completed and returned within twenty-one (21) days from the date they are actually forwarded to you. The address to which all requests for appeal forms must be sent is:

Disciplinary Review Board
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
C.N. 962
Trenton, New Jersey 08625

Very truly yours

s/ David E. Johnson, Jr.
David E. Johnson, Jr.
Director

RJE: rh
Encl.

cc: Blossom A. Peretz, Esq. (w/encl.)
Records Section (with entire file)

Appendix A

TO: Richard J. Engelhardt
FROM: Jennifer L. Hand [init.]
SUBJECT: **Granger v. Peretz**
Docket No. XIV-96-242E
DATE: August 5, 1996

REPORT OF PRELIMINARY INVESTIGATION

I. STATEMENT OF PROCEDURAL HISTORY

On October 23, 1995 Theodore C. Granger filed a grievance against Blossom A. Peretz, Director of the Division of the Ratepayer Advocate ("DRA"), alleging violations of RPC 1.7(b)(2), 1.11(c), 1.16(a), 5.1(b), and 8.4(a). (**Exhibit A**). The thrust of Granger's grievance was that Peretz served as Secretary to the Board of Public Utilities ("BPU") from February 1994 to May 1995 when she became Director of the DRA, and in these capacities she participated in a matter in which she was previously involved while she was in private practice. On April 5, 1996, Granger wrote to the Office of Attorney Ethics, outlining his grievance against Peretz in much greater detail. **(Exhibit B)**. On July 9, 1996, Peretz submitted a response. **(Exhibit C)**. On July 11, 1996, the Office of Attorney Ethics requested additional comments from Granger, which were provided on August 2, 1996. **(Exhibit D)**.

II. STATEMENT OF FACTS

Peretz served as Secretary to the BPU from February 1983 to July 1987. From July 1987 to February 1994 she was engaged in the private practice of law in New York and New Jersey. While in private practice, she was retained to represent Freehold Cogeneration Associates ("Freehold") in their

negotiation of a power purchase with Jersey Central Power & Light Company ("JCP&L)". In February 1994 she returned to her position as Secretary to the BPU. In May 1995 she was nominated and confirmed[1] to be the first Director of the DRA.[2]

While Peretz was representing Freehold, *JCP&L* filed a petition with the BPU seeking approval of a power purchase agreement between *JCP&L* and Freehold. The BPU approved the agreement on November 24, 1993. After the agreement was approved, the energy crisis subsided, and there was a need to modify the agreement. Peretz was involved with the renegotiations of the agreement. In February 1994, when Peretz returned to the BPU as Secretary, the renegotiations had not resulted in a modification of the agreement, and litigation had begun in the federal courts.[3] The BPU had also begun to conduct evidentiary hearings.

After Peretz rejoined the BPU she recused herself from any staff discussions involving the Freehold matter. **(Exhibit E, p. 1)**. Additionally, Peretz's administrative assistant was instructed to screen all phone calls, correspondence and filings served upon Peretz to ensure she would not be exposed to any Freehold matter. Also the assistant was directed to stand in Peretz's place and attest all signatures on all documents concerning Freehold.

---

1. Peretz was appointed and reconfirmed to this position in May 1996.

2. Pursuant to *N.J.S.A.* 13:1D-1, the DRA is to represent all consumers of the State of New Jersey in utility rate matters, including residential, small business, commercial and industrial ratepayers. Additionally, the goal of the DRA is to negotiate where possible, as opposed to litigation.

3. Freehold was seeking to uphold the terms of the contract agreement.

(Exhibit F, p. 1). Peretz also recused herself from the Freehold matter when she became Director of the DRA. **(Exhibits G, p. 2 and H, p. 1 and I, p. 5)**. In fact Peretz placed Bruce Burcat, Assistant Deputy Public Advocate of the DRA, in charge of the Freehold matter. **(Exhibit G, p. 2)**.

In his allegations against Peretz, Granger specifically charged a violation of RPC 1.11(c), which prohibits a lawyer serving as a public officer or employee from participating in a manner in which the lawyer participated personally and substantially while in private practice. Granger also charges Peretz with RPC 1.7(b)(2), which proscribes an attorney from representing a client if the representation of the client will be materially limited by the lawyer's responsibilities to another client. Granger further complains that pursuant to *RPC* 1.16 (a) (1) , Peretz should not have accepted the Secretaryship of the BPU or Directorship of the DRA, because the Rules of Professional Conduct were violated by her employment with these agencies. Additionally, Granger claims that Peretz attempted to induce improper conduct from Granger, her subordinate, a violation of *RPC* 8.4(a) and 5.1(b).

III. LEGAL ANALYSIS

RPC 1.11(c) prohibits a lawyer in public service from participating in a matter in which the lawyer participated personally and substantially while in private practice. Additionally, the Court has a long history of prohibiting situations in which there has been no actual impropriety, but rather an appearance of impropriety. *In re Opinion No. 569*, 1033 *N.J.* 325, 329 (1986); *Ross v. Canino*, 93 *N.J.* 402, 409 (1983); *Reardon v. Marylane, Inc.*, 83 *N.J.* 460, 473 (1980). However, "the appearance of impropriety must be something

more than a fanciful possibility. It must have some reasonable basis." *Higgins v. Advisory Comm. on Professional Ethics,* 73 *N.J.* 123, 129 (1977).

"Confidence in the government depends to a large extent on confidence in the honesty and integrity of its employees." *In re Opinion 569, supra,* 103 *N.J.* at 331. Therefore, "[w]hen representation of public bodies is involved, th[e] Court has also recognized that the appearance of impropriety assumes an added dimension." *Id.* at 330. citing, *In re Petition for Review of Opinion 552,* (1986); *In re Opinion No. 415,* 81 *N.J.* 318, 324 (1979). "Precisely because government attorneys are invested with the public trust and because they are more visible to the public, their conduct must be even more circumspect than the private attorney." *Ibid.*

In this case, Peretz, a public attorney did not participate in a matter that she was involved in while in private practice. Peretz recused herself from the Freehold matter. In fact to avoid actual impropriety or an appearance of impropriety Peretz had her assistant screen all phone calls, correspondence, and filings so she would not inadvertently review or become aware of any information concerning the Freehold matter. **(Exhibit F, p. 1; Exhibit I, p. 6-7)**. The record reveals that Peretz did not violate *RPC* 1.11(c).

Granger also claims that Peretz violated *RPC* 1.7(b)(2), because she displayed her loyalty to Freehold while she was at the BPU and the DRA. *RPC* 1.7(b)(2) prohibits an attorney from representing a client if that representation will be materially limited by the attorney's responsibilities to another client or by the lawyer's own interest. Granger claims that Peretz was

materially limited in performing her statutory responsibilities[4] to the DRA, because of her loyalty to Freehold.

However, the record reveals that Peretz did not show any favoritism toward Freehold. In fact, Peretz recused herself from all Freehold matters. Furthermore, Peretz did not interfere with the handling of the Freehold matter, she relinquished control of the Freehold case to Bruce Burcat. **(Exhibit G, p. 2)**. Finally the record shows that the DRA aggressively opposed Freehold's position during the litigation, **(Exhibit G, p.2)**, thus Freehold did not receive any advantage because Peretz was in charge of the DRA.

Granger claims that pursuant to *RPC* 1.16 (a) , Peretz should not have accepted employment at the BPU or the DRA. *RPC* 1.16 (a) prohibits a lawyer from representing a client if the representation will result in a violation of the Rules of Professional Conduct. As previously mentioned, *RPC* 1.11(c) and 1.7(b) (2) were not violated by Peretz, therefore she is not prohibited from employment at the DRA or the BPU. Furthermore, when she undertook representation of the State, by accepting employment at the BPU and the DRA, Peretz took steps, such as recusing herself and screening her communications, to ensure the RPC's were not violated.

Finally, Granger claims that Peretz violated *RPC* 8.4 (a) and 5.1 (b) by attempting to induce him to participate in improper conduct. *RPC* 8.4(a) states that it is professional misconduct for a lawyer to violate, attempt to violate, or induce

---

4. Her statutory duties were to uphold the mandate of the legislation, which was to represent all interests of all classes of ratepayers, including residential, small business, commercial and industrial, and their relationship to the economic health of the State of New Jersey.

another to violate the Rules of Professional Conduct. *RPC* 5.1(b) requires a lawyer in a supervisory position over another lawyer to make reasonable efforts to ensure that the lawyer conforms to the Rules of Professional Conduct.

Granger claims Peretz tried to dissuade him from filing a petition for certiorari with the Supreme Court. However, the affidavit of Bruce Burcat shows that Burcat, who was in charge of the Freehold matter for the DRA, agreed to the filing of the writ and that Peretz never asked Burcat to handle the Freehold matter any differently than he was. **(Exhibit G, p. 2)**. Granger also claims that Peretz attempted to coerce Granger to report details of what he was doing on the Freehold matter. Granger does not provide any proof to show that Peretz did this. In contrast, Peretz has provided certifications and affidavits from fellow employees to show that she did not coerce information from them, rather she asked to be shielded from information regarding the Freehold matter.

The standard of proof in ethics violations is clear and convincing evidence. *See, In re Pennica,* 36 *N.J.* 401, 419 (1962) ; *R.* 1:20-6(c)(2)(B). Granger's allegations of violations of *RPC* 8.4(a) and 5.1(b) do not meet this standard. In fact Granger does not offer any proof to substantiate his claims. Peretz on the other hand offers affidavits and certifications in support of her contention that she did not coerce any information concerning the Freehold matter.

Moreover, it is noteworthy to mention that Granger appears to be little more than a disgruntled employee who filed his grievance two weeks prior to his resigning his position with the DRA. Granger resigned on November 7, 1995, after Peretz had

given him oral and written warnings[5] concerning his "sloppy work habits, his flouting of office attendance procedures, his careless writing skills, his unwillingness to cooperate as a team player, his isolation from colleagues and his disregard of his responsibilities as a legal team member of the DRA. 11 **(Exhibit C, p. 11)**. Specifically, his resignation came four days after Peretz sent him a personal and confidential memo detailing his unprofessional conduct during the preparation of a motion in another matter, unrelated to the Freehold case. **(Exhibit C, p. 11)**.

IV. CONCLUSION

The standard of proof required to sustain a finding of unethical conduct is clear and convincing evidence. In this matter I am convinced Granger's allegations do not rise to this level. I therefore recommend this matter be dismissed.

---

5. According to Peretz, Granger's personnel file is replete with notes from previous supervisors and colleagues concerning his problems relating both to his difficulties accepting supervision and his timely attention to office procedures.

APPENDIX B — LETTER OF THE DISCIPLINARY REVIEW BOARD DATED NOVEMBER 22, 1996

DISCIPLINARY REVIEW BOARD
OF THE
SUPREME COURT OF NEW JERSEY

RICHARD J. HUGHES JUSTICE COMPLEX
CN 962
TRENTON, NEW JERSEY 08625-0962
(609) 292-1011

* * *

November 22, 1996

Theodore C. Granger
161 West 16th Street #7-K
New York, New York 10011-6204

In the Matter of Blossom R. Peretz
Docket No. DRB 96-383
District Docket No IXV-96-242E

Dear Mr. Granger:

The Disciplinary Review Board has considered your appeal from the dismissal of your grievance by the Director of the Office of Attorney Ethics. Upon full review and consideration of the matter, the Board has directed me to advise you that it has affirmed the Director's action. The Board's determination is based upon its review of the entire file, including your appeal, the investigative report and all underlying documentation. Following this review, the Board adopted the conclusions of the Director, as reflected in the report, and found not clear and convincing evidence of

unethical conduct. The Board, therefore, has dismissed your appeal.

Under *R.* 1:20-9(a) and *R* 1:20-9(h), you are required to continue to keep all communications regarding this ethics matter confidential. A copy of said rules is enclosed. Also enclosed is a pamphlet on grievance procedures which may be helpful to you.

Very truly yours,

Robyn M. Hill
Chief Counsel

By: s/ Colin T. Tams
Colin T. Tams
Assistant Counsel

/wp
Enclosure
cc: David E. Johnson, Jr., Esq., Director (w/o encl.)
Office of Attorney Ethics
Blossom R. Peretz, Esq. (w/o encl.)

APPENDIX C — ORDER OF THE SUPREME COURT OF NEW JERSEY FILED APRIL 24, 1998

SUPREME COURT OF NEW JERSEY
D-17 September Term 1997

IN THE MATTER OF

BLOSSOM PERETZ,

ATTORNEY AT LAW

ORDER

This matter having been duly presented to the Court on the motion of Theodore C. Granger, Esquire, for leave to appeal the Disciplinary Review Board's dismissal of grievant's appeal pursuant to *Rule* 1:20-16(b) and *Rule* 1:20-16(f)(2), and good cause appearing:

It is ORDERED that the motion for leave to appeal is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 23rd day of April, 1998.

s/ Stephen [illegible]
CLERK OF THE SUPREME COURT

APPENDIX D — OPINION 467
PUBLISHED JANUARY 1, 1981

CONFLICT OF INTEREST — DR 9-101, DR 5-105(D) PUBLIC AGENCY ATTORNEY TRANSFERRING TO OR ACCEPTING POSITION IN ANOTHER PUBLIC AGENCY

A member of the Attorney General's staff seeks to accept a position in the Department of Public Advocate, specifically its Office of Advocacy for the Developmentally Disabled. His duties in the Attorney General's office included participation in three matters in which the Department of Public Advocate through its Division of Public Interest Advocacy was either a possible party, a party, or *amicus curiae.* The new position is in a different division of that department, headed by a different individual; its offices are in a building different from that of the Division of Public Interest Advocacy. The Department of Public Advocate exercises a policy of screening its lawyers from any direct or indirect participation in matters which they may have worked on during prior employment. Our opinions have considered situations where an attorney in public employment seeks to affiliate with a private firm which is litigating for private clients in opposition to that attorney's public employer. DR 9-101(B): provides: "A lawyer shall not accept public employment in a matter in which he had substantial responsibility while he was a public employee."

In our Opinion 381, 100 N.J.L.J. 1053 (1977), we held that DR 9-101(B) prevented a deputy attorney general, substantially involved in a pending suit, from accepting employment with the private firm represented that it would screen the deputy attorney general from all participation in that case. The directive "Notice to the Bar", 86 N.J.L.J. 713 (1963). was cited as controlling. And see Opinions 388, 101 N.J.L.J. 120 (1978), 344, 99 N.J.L.J. 705 (1976), 339, 99 N.J.L.J. 601 (1976), 329, 99 N.J.L.J. 433 (1976)

and 29, 87 N.J.L.J. 106 (1964). In that case, DR 5-105(D) applied to preclude the new employment while the partners and associates of the new firm continued in the litigation against the State.

In our Opinion 29, *supra*, we held that an attorney who was counsel to two different public agencies should not negotiate a contract between them. In doing so we extended the application of DR 9-101 and the above "Notice to the Bar" to matters in which two public agencies are concerned.

However the Office of the Attorney General and the Department of Public Advocate are together seeking the enforcement of law and the protection of the public interest. Though these officers may take opposing positions in certain controversies they have a common goal, the advancement of good government in all its economic and social components.

DR 9-101 is derived from Canon 9: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." This precept is the policy consideration behind that rule. It is raised when it appears that an attorney is "switching sides" for personal benefit. We invoke it where there is an adequate basis for a belief by members of the public reasonably familiar with governmental affairs that these relationships create a high risk of impropriety. *Perillo v. Advisory Committee on Professional Ethics*, 103 N.J. 481 (1980).

In applying this policy to our inquiry we conclude that the separation of the two divisions of the Public Advocate in location, structure and supervision must be taken into account; and that a screening process not accepted in Opinion 381, *supra*, will remove the "switching sides" problem since the two employers are public agencies. We stress the absolute need to isolate the

employee in his new job from any contact, direct or indirect with the litigation in which he had substantial responsibility during his prior employment. Under these facts there is no risk that the public may view the employment change as creating a high risk of impropriety. Testing this inquiry by these considerations we approve the transfer. In coming to this conclusion we are mindful of the need for encouraging government attorneys to stay in the public service. See A.B.A. Comm. on Ethics and Professional Responsibility Opinion 342, note 18, at 6 (1975).

APPENDIX E — INFORMATION ABOUT GRIEVANCE PROCEDURES AND DISCIPLINE OF LAWYERS

This pamphlet has been prepared for the information of people who have filed a grievance or who may wish to file a grievance against a lawyer. Please read it carefully. If explains the procedures and is designed to prevent misunderstanding.

Published as a public service by the

OFFICE OF ATTORNEY ETHICS
OF THE
SUPREME COURT OF NEW JERSEY
RICHARD J. HUGHES JUSTICE COMPLEX
C.N. 963
TRENTON, NEW JERSEY 08625
(609) 292-8750

OVERVIEW

When they enter the practice of law, all lawyers obligate themselves to uphold the law and to abide by the Rules of Professional Conduct adopted by the Supreme Court of New Jersey. Those who violate these standards for professional conduct are subject to discipline, ranging from private reprimand to disbarment.

Because disciplining a lawyer is a serious matter, it takes evidence — proof of unethical conduct — to justify disciplinary action. Just as it takes proof before any member of society may be penalized for wrongdoing, the action of the lawyer must constitute unethical conduct before the lawyer is disciplined. An honest disagreement about how a case should be handled — or should have been handled — does not constitute unethical conduct, even if the outcome of the case is disappointing.

Appendix E

A mistake does not necessarily constitute unethical conduct either. If a mistake causes a loss, the client may be able to recover the loss in a civil suit against the lawyer for money damages. But a simple mistake or error in judgment by itself is not unethical conduct.

There are situations that a client may find most annoying, but that do not constitute unethical conduct. An example would be the lawyer's failure to consult with the client prior to writing eery letter or prior to filing every document in the client's case, or perhaps the lawyer's failure to respond to all of the client's telephone calls inquiring about the progress of the case. If you have a problem that may be the result of inadequate communications or some misunderstanding, it may be that the problem can best be resolved by a frank talk with your lawyer. Tell your lawyer of your dissatisfaction, and ask for a full explanation of the matter involved. Such a discussion will often either eliminate the problem or lead to its solution.

Finally, the disciplinary process cannot correct a lawyer's personality problems. A complaint that a lawyer was rude, used bad language, or failed to pay a bill is not something the disciplinary system generally can investigate.

While it is impossible to list all of the acts or omissions which may constitute unethical conduct, here are a few examples of prohibited conduct which, if proven, may be cause for discipline.

- A lawyer cannot or will not give you money that he or she is holding on your behalf and to which your are entitled, or will not provide you a complete written accounting for that money.

- A lawyer **continually** fails to respond at all to inquiries about your case, to tell you about court dates, or to appear in court. Where the problem is simply a lack of communication, **first** try your best to resolve the problem yourself.

- A lawyer advises you or anyone else to lie, or lies himself or herself in the course of a case. Lawyers pride themselves on their honesty. The profession does not need those who feel they must resort to deception to conduct their practice.

- A lawyer represents one party to a transaction while also the attorney for the other side. This is a conflict of interest and is generally prohibited unless both parties are fully aware of the situation and consent to it.

If you believe that your lawyer has been unethical you should contact the Office of Attorney Ethics at [(609) 292-8750] and you will be informed as to the name, address and telephone number of the ethics secretary to contact to request an Attorney Grievance Form.

FEE DISPUTES

Fee matters are not ordinarily a basis for discipline of a lawyer because they usually do not involve questions of unethical conduct. Furthermore, our court rules require that fee disputes first be pursued with district fee arbitration committees before they can be considered by ethics committees.

Some fee disputes may be the result of an overcharge by the lawyer. Others, however, may result from your

misunderstanding the basis for the fee and the various factors that go into the charge made by a lawyer for services.

Today all lawyers are required to explain in writing to new clients the basis or rate of fee to be charged. This must be done near the time the lawyer first accepts the case. Both you and your lawyer should discuss any questions regarding fees at the initial conference so that you both have a clear understanding of what will happen in your case and how much the case will cost.

Despite discussions as to the basis or rate of fee, sometimes misunderstandings develop and a controversy arises. Fees, like any other disputes over the value of services, may be resolved by court actions.

As an alternative to court action, the Supreme Court of New Jersey has created 16 district fee arbitration committees, which will resolve, at the clients request, through binding arbitration, disputes concerning alleged excessive fees. If you desire assistance by a fee arbitration committee in determining the appropriateness of the fee charged by your lawyer, contact the Office of Attorney Ethics [(609) 292-8750] and you will be informed as to the proper person to contact to request fee arbitration forms.

THE OFFICE OF ATTORNEY ETHICS

In October 1983, the Supreme Court of New Jersey established the Office of Attorney Ethics (OAE) to manage all district ethics and fee arbitration committees throughout the state. In addition to broad-ranging administrative and managerial powers, the OAE also has jurisdiction to investigate and

prosecute complex ethics matter. It handles exclusively all ethics cases in which the lawyer is also a defendant in any criminal proceeding. Additionally, the OAE takes any emergent action that may be necessary to protect the public by applying to the Supreme Court for immediate temporary suspensions. This may occur, for example, when a lawyer has been convicted of a serious criminal violation, or where there is substantial proof that clients' trust money has been stolen. Likewise, the OAE manages statewide all district fee arbitration committees, which hear client disputes over lawyers' bills for services. The OAE also administers the Supreme Court's Random Audit Compliance Program, which conducts audits of attorneys' trust and business accounts to see that proper records of clients' funds and attorneys' fees are maintained by all lawyers. Finally, the OAE manages the Trust Overdraft Notification Program, which provides for the active review of overdrafts of attorney trust accounts as reported by New Jersey financial institutions.

THE PURPOSE OF DISCIPLINE

The primary purpose of attorney disciplinary proceedings is to protect the public by imposing discipline on a lawyer who has behaved in an unethical manner in handling a client's case. Neither the Office of Attorney Ethics nor any of the district ethics committees can provide private legal service or advice to any person filing a grievance. Furthermore, if you have lost money as a result of the matter involved, the money cannot be recovered through disciplinary proceedings. If you seek to recover money damages, you should consult another attorney to discuss bringing a civil suit against the original lawyer for money damages. Ethics committees are empowered to recommend disciplining an attorney who is guilty of unethical conduct; however, these committees are not courts and cannot award money damages to any party.

Appendix E

DISCIPLINE OF LAWYERS

Discipline of lawyers may take one of several forms, depending on the particular circumstances and the severity of the offense: private reprimand, public reprimand, suspension from practice for a period of time, or disbarment.

The procedures that you must follow in processing a grievance against a lawyer are outlined here so that you may understand what is involved. You should know that the cost of the disciplinary system is financed totally by annual fees paid by lawyers. No taxpayers' monies are used. You should also be aware that all members of the district ethics and fee arbitration systems, both attorneys and public members, are volunteers who donate their time and services to improve the profession.

FILING A GRIEVANCE

All grievances must be in writing and filed with the Secretary of the district ethics committee for the district in which the lawyer has his or her main law office. Ethical conduct is a personal obligation of a lawyer and therefore a grievance must be filled against a specific lawyer and not against a law firm. Since there are currently 17 district ethics committees throughout the state, you are advised either to write to the Office of Attorney Ethics, Supreme Court of New Jersey, Richard J. Hughes Justice Complex, CN 963, Trenton, New Jersey 08625 or to telephone (609) 292-8750. Inform the receptionist of the location of the lawyer's office, and she will give you the name, address and telephone of the appropriate ethics secretary to contact in order to file your grievance.

Appendix E

You must provide sufficient detail about the facts of your grievance, such as names and addresses of all witnesses, dates and pertinent documentation, in the Attorney Grievance Form to serve as a basis for further investigation. Failure to provide important facts and copies of important documents may result in a delay in the consideration of the grievance while the documentation is obtained.

PRELIMINARY INVESTIGATION

After receiving an Attorney Grievance Form the Secretary will review the form to determine whether the grievance should be docketed. To help evaluate the matter the Secretary may speak or write to you or the lawyer for further information. If the grievance is a fee dispute or involves pending civil or criminal litigation the Secretary may decline to docket the case. If the facts alleged in the grievance would not constitute unethical conduct even if proven (for example, where the lawyer is simply alleged to have been rude or used bad language, or where the lawyer did not pay a bill), the Secretary may decline to docket the case. In such event the Secretary will notify you of the reason that the case was declined.

Upon receipt of your grievance alleging conduct by a lawyer which, if proven, would be unethical, the Secretary of the committee dockets the case and assigns the matter to a lawyer-member for investigation necessary to determine the validity of the allegations. A written report of investigation is then submitted to the Chair of the committee, who determines whether there is an indication of unethical conduct. If the Chair finds that no such indication exists, the Chair directs the Secretary to dismiss the matter and to provide you with a copy of the report of investigation. In such event, the investigative

stage of the matter is at an end. You have the full right, however, to appeal the dismissal to the statewide Disciplinary Review Board. The Board's address is provided in the Secretary's letter of dismissal. If, however, the Chair determines that there is sufficient indication of unethical conduct, a formal complaint is prepared. The complaint is served upon the lawyer, who is then required to file a formal answer within 10 days of service. This step begins what is known as the hearing stage.

HEARINGS

All formal matters are tried before a hearing panel consisting of at least three members, usually composed of either two lawyers and one public member or three lawyers. The procedure in disciplinary hearings is similar to that in court trials. A court reporter makes a record of the entire proceeding. Testimony is given under oath. Attendance of witnesses and the production of records may be compelled by subpoena. The hearing is confidential in nature and not open to the public.

After the hearing is concluded, the panel deliberates and takes one of the following three actions:

1. dismisses the complaint, if it finds that the lawyer has not committed unethical conduct;

2. determines that the lawyer has been guilty of minor unethical conduct for which a private reprimand is adequate discipline; or

3. determines that the lawyer has been guilty of unethical conduct for which public discipline of some kind, including public reprimand, suspension, or disbarment, is required.

Appendix E

DISCIPLINARY REVIEW BOARD

In the event that your grievance has been dismissed by a committee at the investigative or hearing stage, either by a committee Chair or a hearing panel, you have the full right to appeal to a statewide Disciplinary Review Board (referred to as the "Board"). There is no charge for an appeal. The Board is composed of nine members (both lawyers and members of the public), who donate their time on a voluntary basis. The Board may uphold the action of the local committee, reverse the decision and impose discipline or return the matter for further proceedings.

When a hearing panel finds unethical conduct warranting either private or public discipline, the panel's report and recommendation are forwarded to and considered by the Board. If after reviewing the matter the Board determines that a private reprimand is adequate discipline, it issues an appropriate letter of reprimand. When a hearing panel has filed a report recommending public discipline, oral argument is routinely scheduled before the Board. The lawyer may appear in person and may be represented by counsel. A representative of the committee appears in support of the hearing panel report. No witnesses are permitted at this oral argument and no testimony is taken. If the Board determines that a public reprimand, suspension, or disbarment should be imposed, its written recommendation must be reviewed by the Supreme Court of New Jersey. The Board forwards a copy of such recommendation to you and to the lawyer.

REVIEW BY SUPREME COURT

Appendix E

Public reprimand, suspension, or disbarment can be ordered only by the Supreme Court of New Jersey. After receiving the Board's recommendation, the Supreme Court hears oral argument on the matter in Trenton. The Office of Attorney Ethics represents the public interest before the Court, which issues a final order disciplining the attorney or determining that no discipline is required.

CONFIDENTIALITY AND IMMUNITY

Disciplinary proceedings are confidential, except in cases in which the Supreme Court imposes public discipline. Under Supreme Court Rules, once you file a grievance, you are required thereafter to keep all communications **regarding the ethics matter confidential.** You are free to make the same complaint to other bodies or to discuss your dissatisfaction with others. You simply may not disclose the fact that you have filed an ethics grievance against the lawyer. You may not breach this confidentiality by disclosing your ethics grievance to persons other than members of the attorney disciplinary system, except to discuss the case with other witnesses or to consult an attorney. So long as you maintain the confidentiality of these ethics proceedings, Supreme Court Rules grant you immunity from lawsuits as a result of filing your grievance. **If you breach this rule of confidentiality, you will lose this Immunity.**

WHAT YOU MAY EXPECT

Grievances against lawyers are not dismissed lightly, nor are they prosecuted without justification. The protection of the public is paramount in considering every grievance filed. You may expect . . .

Appendix E

- A prompt reply from the Secretary of the district ethics committee acknowledging receipt of your grievance.

- A fair and impartial investigation. This means listening not only to your side of the story, but to the lawyer's side as well. It also means that whatever independent investigation may be necessary in order to establish the facts will be conducted.

- As speedy a disposition as is possible of your grievance. Depending on the complexity of the matter, this can take from a month to a year or longer.

- To be called as a witness, if necessary, and to provide additional information for the investigation of your grievance.

- That even though a matter is resolved between you and your lawyer, your continued cooperation may be necessary to conclude the ethics committee's processing of the case.

- Disciplinary action, commensurate with the offense, against any lawyer found to have violated the Rules of Professional Conduct.

- To be kept informed of the progress of the investigation and to be notified of the final disposition of the matter.

There are no charges or other costs to you by the attorney disciplinary system.

Appendix E

WHAT YOU SHOULD NOT EXPECT

You should not expect that your grievance will be decided solely on the basis of what you claim to have happened, just as, in fairness to you, the lawyer about whom you complained cannot expect that the matter will be decided solely on the basis of his or her version. The final decision must depend upon the weight of all the available evidence and testimony.

You should not expect, as a result of your grievance, that you will receive any money or reimbursement of loss from the ethics committee. You must seek recovery of any monetary loss you may claim was caused by a lawyer, from that lawyer, either voluntarily or as a result of a lawsuit. As explained below in this pamphlet, when money has been lost due to **dishonest** conduct, the Clients' Security Fund may reimburse the clients' loss. Attorney disciplinary proceedings, however, are restricted to the question of lawyer's ethical fitness to continue to practice law.

Neither should you expect the disciplinary system to provide you with private legal advice or legal services, either in place of the services you expected from your lawyer, or against the lawyer. The disciplinary system acts only to enforce the Rules of Professional Conduct upon lawyers.

CLIENTS' SECURITY FUND

Occasionally a grievance against a lawyer involves dishonest conduct. If you believe that money or other property belonging to you has been taken by your lawyer, in addition to filing a grievance, you may also file a claim with the Clients' Security Fund (referred to as the "Fund") after notifying the appropriate County Prosecutor and district ethics committee of the incident.

Appendix E

It is important to note that the Fund is a separate committee of the Supreme Court with its own distinct purpose, jurisdiction and procedures. Just as the district ethics and fee arbitration committees cannot pay claims, the Fund cannot discipline attorneys or settle fee disputes. Nor may the Fund pay claims based upon the negligence or malpractice of an attorney. You must prove a loss suffered through the dishonest conduct of an attorney with whom you had an attorney-client or fiduciary relationship. The attorney against whom the claim is made must be either suspended or disbarred, unless deceased or otherwise unavailable, for the Fund to have jurisdiction.

The Fund is administered by six Trustees (five attorneys and one public member) all of whom donate their time and talents. The Fund receives no tax revenues but rather pays its awards out of money paid by New Jersey attorneys themselves each year as a demonstration of commitment to maintaining public confidence in the legal system. If you have questions or if you wish to obtain a claim form, please call (609) 292-8079 or write to:

Clients' Security Fund
of the Bar of New Jersey
Richard J. Hughes Justice Complex
CN 961
Trenton, New Jersey 08625

CONCLUSION

Those involved in the attorney disciplinary system appreciate your interest. They seek fair, impartial and vigorous

enforcement of the Rules of Professional Conduct in the interests of the public, clients, and the legal profession.

APPENDIX F — NEW JERSEY COURT RULES (1996)

1.20-2. Office of Attorney Ethics

* * *

(b) Authority. The Director shall have the discretion and authority to:

(1) exercise exclusive jurisdiction over the investigation and prosecution of the following category of cases:

(A) any case in which the Director determines the matter involves serious or complex issues that must be immediately addressed or one that requires emergent action;

* * *

(E) any case in which the Board or the Supreme Court determines the matter should be assigned to the Director. In all actions the Director shall exercise all of the investigative and prosecutorial authority of an Ethics Committee in addition to any inherent authority invested in the Director by virtue of these rules.

* * *

1:20-3. District Ethics Committees; Investigations

(a) Disciplinary Districts. The Supreme Court shall establish, and may from time to time alter, disciplinary districts consisting of defined geographical areas and shall appoint in each such district a District Ethics Committee which shall consist of such number of members, not fewer than 8, as the Court may determine, at least 4 of whom shall be attorneys of this state, at least 2 of whom shall not be attorneys, all of whom shall either reside or work in the district or county in which the district is located.

(b) Appointments. Members of Ethics Committees shall be appointed by, and shall serve at the pleasure of the Supreme Court for a term of 4 years. A member who has served a full term shall not be eligible for reappointment to a successive term, except that a member appointed to fill an unexpired term shall be eligible for reappointment to a full successive term. A member serving in connection with an investigation pending at the time the member's term expires may continue to serve in such matter until its conclusion. In order that, as nearly as possible, the terms of one-quarter of the members shall expire each year, the Supreme Court may, when establishing a new Ethics Committee, appoint members for terms of less than 4 years and members so appointed shall be eligible for reappointment to a full successive term.

(c) Officers; Organization. The Supreme Court shall annually designate a member of each Ethics Committee to serve at its pleasure as chair and another member to serve as vice-chair. Whenever the chair is absent or unable to act or disqualified from acting due to a conflict, the vice-chair shall perform the duties of the chair. The chair shall be responsible for administering the Ethics Committee. Under the chair's direction, the vice chair, or another Ethics Committee member designated by the chair, shall be responsible for administering all matters where a complaint has been filed.

Each Ethics Committee shall hold an organization meeting in September of each year and shall meet thereafter at least monthly, except when there is no business to be conducted. The Ethics Committee shall also meet at the call of the Supreme Court, the chair, the Board or the Director.

The Director shall, after consultation with the chair, appoint a secretary who shall not be a member of the Ethics Committee

but who shall be a member of the bar maintaining an office within the district or county in which the district is located. The secretary shall continue to serve at the pleasure of the Director and shall be paid an amount annually set by the Supreme Court. The secretary shall keep full and complete records of all Ethics Committee proceedings, shall maintain files with respect to all grievances received and investigations undertaken, shall transmit copies of all documents filed immediately on receipt thereof to the Director and shall promptly notify the latter of each final disposition. Reports with respect to the work of the Ethics Committee shall be filed by the secretary with the Director as instructed by the Director.

(d) Office. Each Ethics Committee shall receive grievances at the office of its secretary and at such additional places as shall be designated by the Director.

(e) Screening; Docketing. (1) The secretary shall evaluate all information received by inquiry, grievance or from other sources alleging attorney misconduct or incapacity by an attorney maintaining an office in that district. If the attorney is subject to the jurisdiction of the Court and the grievance alleges facts which, if true, would constitute misconduct as defined by the Rules of Professional Conduct, caselaw or other authority, or incapacity, the matter shall be docketed and investigated.

(2) The secretary shall decline jurisdiction if:

(A) the attorney is not subject to the jurisdiction of the Supreme Court of New Jersey, in which case the matter shall be declined and referred to the appropriate entity in any jurisdiction in which the attorney is admitted;

(B) the matter involves an inquiry or grievance regarding advertising or other related communications within the jurisdiction of the Committee on Attorney Advertising (R. 1:19A-2(a)), in which case the matter shall be sent to that committee unless the matter has been referred by the Advertising Committee in accordance with R. 1:19A-4(e) or (h);

(C) the facts stated in the inquiry or grievance involve circumstances which the Supreme Court has determined through the adoption of court rules or administrative guidelines will not be entertained, in which case the matter shall be declined.

(D) the grievance involves aspects of both a fee dispute and a charge of ethical misconduct unless so directed by the Director or unless the matter is referred by the Fee Committee in accordance with Rule 1:20A-4.

(3) The secretary, with concurrence by a designated public member, shall decline jurisdiction if the facts stated in the inquiry or grievance, if true, would not constitute misconduct or incapacity.

(4) If a grievance is not in writing and if the secretary concludes that the grievance must be declined under subsection (e)(2) or that the grievant alleges facts that, even if true, would not constitute misconduct or incapacity, the secretary shall so advise the grievant and that if the grievant wishes further consideration the secretary will provide a written attorney grievance form for completion. Unless declination is mandatory under subparagraph (e)(2), on receipt of a properly completed attorney grievance form the secretary will have the grievance reviewed by a public member of the Ethics Committee designated annually by the chair. If that member agrees with the secretary,

the matter shall be declined. Otherwise, the matter shall be docketed and assigned for investigation.

(5) If a matter is declined, the secretary shall furnish a concise written statement to the grievant of the reasons therefor and shall enclose a copy of the court rule or written guideline for declination approved by the Supreme Court.

(6) There shall be no appeal from a decision to decline a grievance made in accordance with this rule. An appeal may be taken from dismissal of a grievance after docketing in accordance with R. 1:20-3(h).

(f) Related Pending Litigation. If a grievance alleges facts which, if true, would constitute misconduct and if those allegations are substantially similar to the material allegations of pending civil or criminal litigation, the grievance shall be docketed and investigated if, in the opinion of the chair or Director, Office of Attorney Ethics, the facts alleged clearly demonstrate provable ethical violations or if the facts alleged present a substantial threat of imminent harm to the public. All other grievances involving such related pending civil and criminal litigation may be declined and not docketed. The grievant shall be advised of any decision in writing together with a brief statement of the reasons therefor and a copy of any court rule or written guideline supporting declination. Whenever an attorney is a defendant in any criminal proceeding, the Office of Attorney Ethics shall docket the matter and may, in its discretion, investigate and prosecute the disciplinary case.

(g) Investigation.

(1) Generally. The chair of the Ethics Committee shall assign an attorney member to each docketed case to conduct such

investigation as may be necessary in order to determine whether misconduct has occurred.

(2) Notice to Respondent. No disposition other than dismissal, declination or designation as untriable shall be taken without first notifying the respondent in writing of the substance of the matter and affording the respondent an opportunity to respond in writing. Notice to the respondent shall be given by mail addressed to the address listed either in the current edition of the New Jersey Lawyer's Diary and Manual or with the Lawyers' Fund for Client Protection.

(3) Respondent's Duty to Cooperate. Every attorney shall cooperate in a disciplinary investigation and reply in writing within ten days of receipt of a request for information. Such reply may include the assertion of any available constitutional right, together with the specific factual and legal basis therefor. Attorneys shall also produce the original of any client or other relevant law office file for inspection and review, if requested, as well as all accounting records required to be maintained in accordance with R. 1:21-6. Where an attorney is unable to provide the requested information in writing within ten days, the attorney shall, within that time, inform the investigator in writing of the reason that the information cannot be so provided and give a date certain when it will be provided.

(4) Failure to Cooperate. If a respondent fails to cooperate either by not replying in writing to a request for information or by not producing the attorney's client and/or business file or accounting records for inspection and review, the Office of Attorney Ethics may file and serve a motion for temporary suspension with the Supreme Court, together with proof of service. The failure of a respondent to file a response in opposition to the

motion may result in the entry of an order of temporary suspension without oral argument until further order of the Court. An attorney temporarily suspended under this rule may apply to the Court for reinstatement on proof of compliance with subsection (3) of this paragraph on notice to the Office of Attorney Ethics.

(5) Notice to Grievant. The respondent's written response shall be communicated to the grievant, who shall be afforded an opportunity to respond in writing within 14 days of receipt of the communication.

(6) Investigative Subpoena. During the investigation of any matter, a subpoena may be issued in accordance with R. 1:20-7(i) in the name of the Supreme Court of New Jersey.

(h) Dismissal and Appeal; Administrative Dismissal. The investigator shall report in writing to the chair, providing a copy to the secretary. The report shall set forth the facts, together with a recommendation for action. If the chair concludes that there is no reasonable prospect of proving misconduct or incapacity by clear and convincing evidence, the matter shall be dismissed. Written notice of the facts and reasons for dismissal shall be provided to the respondent, the Director and to the grievant, who shall be advised of the right of appeal to the Board within 30 days as provided by R1:20-15(e)(1).

The Director may authorize that a grievance be declined or administratively dismissed where either the attorney has been disciplined and the Director determines that the processing of additional matters against the respondent would not likely result in the imposition of substantially different discipline, or the attorney, although not yet disciplined, is already the subject of disciplinary proceedings and the nature or time periods covered

by the additional grievances are similar to other misconduct already being pursued, so that the results would be likely to be merely cumulative. If so approved, the secretary shall give notice of declination or administrative dismissal to any grievant, together with an explanation of the reasons supporting the action.

(i) Determination of Misconduct.

(1) Generally. If the chair determines that there is a reasonable prospect of a finding of misconduct by clear or convincing evidence, a further determination shall be made as to whether such conduct is either misconduct or minor misconduct.

(2) Minor Misconduct.

(A) Defined. Minor misconduct is misconduct which, if proved, would not warrant a sanction greater than a public admonition. Misconduct shall not be considered minor if any of the following considerations apply: (i) the misconduct involves the misappropriation of funds; (ii) the misconduct resulted in or is likely to result in substantial prejudice to a client or other person and restitution has not been made; (iii) the respondent has been publicly disciplined in the previous five years; (iv) the misconduct involved is of the same nature as misconduct for which the respondent has been disciplined in the past five years; (v) the misconduct involves dishonesty, fraud or deceit; (vi) or the misconduct constitutes a crime as defined by the

* * *

Appendix F

1:20-7. Additional Rules of Procedure

* * *

(i) Subpoena Power.

* * *

(2) Investigative and Hearing Subpoenas. During the investigation or hearing of a matter, a subpoena may be issued in the name of the Supreme Court to compel the appearance of any person for questioning or testimony or to compel the production of books, records, documents or other items designated therein. The subpoena shall issue in a form approved by the Supreme Court. Investigative and hearing subpoenas may be signed to any Ethics Committee member, the presenter, ethics counsel or by the Board of its legal staff. Hearing subpoenas may also be issued by a hearing panel member, special ethics master or by the Board or its staff.

* * *

(j) Grievances Against Disciplinary Agency members.

(1) Grievances Alleging Improper Processing. Any grievance against Ethics Committee or Fee Committee members and secretaries, members of the Office of Attorney Ethics, hearing panels, special ethics masters or the Board, their lawfully appointed designees and staff, arising out of their processing of an ethics grievance or fee arbitration request shall be filed with and considered exclusively by the Board in connection with any appeal or other authorized review of a matter in the normal course under R. 1:20-15(e). After review, the Board shall make any

appropriate direction regarding the grievance. Nothing herein shall preclude introduction of the facts which underlie the grievance in evidence in any ethics proceeding if relevant.

* * *

APPENDIX G — NEW JERSEY RULES OF PROFESSIONAL CONDUCT

RPC 1.7(b)(2):

(2) . . . except that a public entity cannot consent to any such representation. . . .

* * *

RPC 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

* * *

RPC 5.1(b):

RPC 5.1 Responsibilities of a Partner or Supervisory Lawyer

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

* * *

Appendix G

RPC 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

* * *

RPC 8.3 Reporting Professional Misconduct

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

* * *

RPC 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

* * *

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

* * *

APPENDIX H — CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT 1

[Religious and political freedom.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peacably to assemble, and to petition the government for a redress of grievances.

AMENDMENT 14

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jursidiction the equal protection of the laws.

* * *

NEW JERSEY CONSTITUTION, ARTICLE 1, § 1

1. Natural and unalienable rights

1. All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of

enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

NEW JERSEY CONSTITUTION, ARTICLE 1, § 6

6. Liberty of speech and of the press; libel; province of jury

6. Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

N.J.S.A. 34:19 3(a) & 3(b)

34:19-3. Employer retaliatory action; protected employee actions

An employer shall not take any retaliatory action against an employee because the employee does any of the following:

a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer or another employer, with whom there is a business relationship, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, *or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care;*

b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer or another employer, with whom there is a business relationship, *or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before any public body conducting an investigation, hearing or inquiry into the quality of patient care.*

APPENDIX I — REMITTANCE ADVICE DATED MAY 20, 1994 (Check Nos. 0A0000479116 & 0A0000479117)

ORGANIZATION NAME	TELEPHONE INQUIRY NUMBER	STATE VOUCHER NUMBER	NET VOUCHER AMOUNT
DIVISION OF RATE COUNSEL	609-984-4021	07083408000052	
REFUND PERIOD 1/15-2/15/91	8340-100-070-8340	016-RRGC-3010	13245
DIVISION OF RATE COUNSEL	609-984-4021	07083408000053	
REFUND PERIOD 2/19-3/7/91	8340-100-070-8340	016-RRGC-3010	9400
DIVISION OF RATE COUNSEL	609-984-4021	07083408000054	
REFUND PERIOD 3/14-3/25/91	8340-100-070-8340	016-RRGC-3010	2900
DIVISION OF RATE COUNSEL	609-984-4021	07083408000055	
REFUND PERIOD 3/21-22/91	8340-100-070-8340	016-RRGC-3010	1150
DIVISION OF RATE COUNSEL	609-984-4021	07083408000056	
REFUND PERIOD 2/14-4/24/91	8340-100-070-8340	016-RRGC-3010	7800
		TOTAL	34495

← DETACH HERE BEFORE CASHING

DEPARTMENT OF THE TREASURY
STATE OF NEW JERSEY
TRENTON, NEW JERSEY 08625

REMITTANCE ADVICE

QUESTIONS SHOULD BE DIRECTED TO APPROPRIATE STATE AGENCY LISTED ABOVE.

CHECK NUMBER 0A0000479116 DATE 05/20/94 PAYEE 290323997 00 THEODORE C GRANGER

ORGANIZATION NAME / PAYEE REFERENCE/INVOICE NUMBER	TELEPHONE INQUIRY NUMBER / STATE ACCOUNT NUMBER	STATE VOUCHER NUMBER	NET VOUCHER AMOUNT
DIVISION OF RATE COUNSEL REFUND PERIOD 1/13-3/22/91	609-984-4021 8340-100-070-8340-016-RRGC-3010	07083408000057	10990
DIVISION OF RATE COUNSEL REFUND PERIOD 3/25-4/8/91	609-984-4021 8340-100-070-8340-016-RRGC-3010	07083408000058	10400
DIVISION OF RATE COUNSEL REFUND PERIOD 4/9-5/30/91	609-984-4021 8340-100-070-8340-016-RRGC-3010	07083408000059	10400
DIVISION OF RATE COUNSEL REFUND PERIOD 5/3-6/26/91	609-984-4021 8340-100-070-8340-016-RRGC-3010	07083408000060	4225
DIVISION OF RATE COUNSEL REFUND PERIOD 6/24-26/91	609-984-4021 8340-100-070-8340-016-RRGC-3010	07083408000061	3900
		TOTAL	39915

← DETACH HERE
BEFORE CASHING

DEPARTMENT OF THE TREASURY
STATE OF NEW JERSEY
TRENTON, NEW JERSEY 08625

JESTIONS SHOULD BE
IRECTED TO APPROPRIATE
TATE AGENCY LISTED ABOVE.

REMITTANCE
ADVICE

HECK
IMBER 0A0000479117 DATE 05/20/94 PAYEE 29032399700 THEODORE C GRANGER